IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Writ Petition No. 1353 of 2001.

Date of decision: April 27, 2007.

Constable Gulam Rasool ….Petitioner.

Versus

H.Qs. B.S.F. and another ….. Respondents.

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1]

For the Petitioners:	**M/S K.D.Shreedhar, Rajnish Maniktala and Neeraj Maniktala, Advocates.**
For the Respondents:	**Mr. Anup Rattan, Central Govt. Counsel.**

Dev Darshan Sud, J. (Oral).

The petitioner has approached this Court with a prayer that the order of dismissal of the petitioner from service by the respondents be quashed and set aside. Various grounds have been raised by

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[1] *Whether reports of Local Papers may be allowed to see the judgment?*

the petitioner assailing the legality of the order.

The case set out by the petitioner is that he joined the Border Security Force as a constable on 20.6.1987. He has averred that he served in border States of Jammu and Kashmir, Meghalaya, on the borders of Bangla Desh etc. and during his service career, he has been decorated with various awards in shooting, athletics, mechanic course and driving etc. He applied for leave with effect from 12.1.1999. When he reached his village in District Chamba, he fell ill and was diagnosed as a patient of "mental neurosia". Petitioner alleges that during this period, he lost his power of comprehension and communication. His condition deteriorated to the extent that he had to be looked after by his father who provided medication, consultation with doctors/ hospital etc.

In reply, the respondents have submitted that the petitioner had been granted 15 days casual leave from 7.1.1999 to 25.1.1999 on the ground that his mother had died. He had to join duty on 27.1.1999, but failed to do so; although a

communication dated 8.2.1999 was sent to him. A Court of Inquiry was conducted under the provisions of Section 62 of the Border Security Force Act, 1968 (hereafter referred to as the Act) to ascertain the circumstances leading to his overstay. It was found that his absence was deliberate and in the circumstances a show cause notice was issued for his dismissal from service. The reply also states that the petitioner is a habitual offender.

The proceedings of the Court of Inquiry have not been placed on record. However, from the material on record I find that the respondents have not considered the case of the petitioner in its true perspective. Annexure P-8 is a communication addressed by the Pradhan, Gram Panchayat to the Commandant in response to the show cause notice dated 14.5.1999 sent to the petitioner. The reply has been written by the Pradhan of the Gram Panchayat stating in clear and unequivocal terms that the petitioner has lost his memory and the medical treatment rendered is making a little or no difference to his

condition. It also states that the father of the petitioner is unable to communicate with the respondents as he is an illiterate person. Para 4 of Annexure P-8 reads:

> **"Aa Gulab Rasul ke Pita Anpad hai jo aap ko apne putar ki halat ka aap ko suchit nahin kar pate (time to time) aur ilaj par bhi kafi paisa kharch ho raha hai. Kyonki sarkari hospital mein koi fark na parne se private doctor ke pas ilaj chal raha hai, jo mind spesliste hai".**

While dealing with this communication, the respondents have not accepted it on the ground that the notice which was sent to the petitioner was received by him and his signatures were taken thereon. Merely signing for receipt of a notice or communication cannot be a ground to assume that the person is in possession of his full mental faculties. How and under what circumstances Annexure P-8 has been dealt with by the Court of Inquiry is not clear. The reply is evasive. A reading of this communication would show that a plea is being made on behalf of the petitioner that he should be helped, his father is illiterate, and thus unable to

communicate with the respondents and under considerable amount of financial strain in treating his son.

Adverting to the provisions of Section 62 of the Border Security Force Act, a Court of Inquiry can be held for ascertaining the unauthorized absence of a person. Sub section (2) provides that in case a person who is declared absent does not surrender, he will be deemed to be a deserter under the Act. This is a drastic provision which not only invites dismissal but also a stigma being a deserter which is a serious matter. It is by now a well settled that desertion is an act which requires animus / intention. As noticed, the proceedings of the Court of Inquiry are not on record. What weighed with the Court in coming to the conclusion that the petitioner is a deserter and should be dismissed from service is not clear. There is also no material to show that he is a habitual offender as alleged and the action taken against him. If Annexure P-8 is considered, it would be evident that the petitioner was incapable of forming any intention as he was mentally unfit and

undergoing medical treatment. His father was an illiterate person, looking after his son in a remote part of the State. The Pradhan made a plea for help to the petitioner, but he was declared as a deserter and dismissed from service. There has been no proper consideration of the case of the petitioner. The mental condition of the petitioner as evidenced by the material in the nature of medical certificate placed on record does not lead to the conclusion that he was a deserter.

In the totality of the circumstances, I find that the case of the petitioner has not been considered in its true and correct perspective. The writ petition is, therefore, accepted, with a direction that the respondents will decide the case of the petitioner afresh in accordance with law on the basis of the material filed before this Court and on any other material on which he may rely. The petitioner will be given an opportunity of being heard in the matter if he so desires. Needless to say, any decision which is arrived at will be by a reasoned order. The petitioner will file a detailed

representation before respondent No. 2 who will dispose it of in accordance with law within a period of four months from its receipt by a reasoned order. There shall be no order as to costs.

April 27, 2007 (PC). (Dev Darshan Sud), J.